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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 871 61

C. LEE BUXTON
Appellant

vs.

ABRAHAM S. ULLMAN, *State's Attorney,*
Appellee

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant Buxton appeals from the judgment of the Supreme Court of Errors of Connecticut entered on December 8th, 1959, dismissing his appeal from the Superior Court of New Haven and affirming the judgment of said Superior Court sustaining defendant's demurrer to appellant's writ and complaint and dismissing the action. Appellant submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered December 8th, 1959, is reported in 147 Conn. 48, 156 A.2d 508.

The opinion of the Supreme Court of Errors of Connecticut is set forth in the Appendix to this Statement.

JURISDICTION

Appellant filed his writ and complaint in the Superior Court of New Haven County, Connecticut, on May 8, 1958, pursuant to Section 52-29 General Statutes of Connecticut, Revision of 1958, and amended by stipulation February 14, 1959. The complaint sought a declaratory judgment to determine whether Section 54-196 and 53-32 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional on their face or as applied to this appellant.

Appellee Ullman filed a demurrer to said complaint which was sustained by the Superior Court of New Haven County, Connecticut, in a memorandum decision filed January 5, 1959. Thereafter a motion for judgment after demurrer was sustained by said court and the complaint dismissed in a ruling filed on January 21, 1959.

Appellant thereupon filed his appeal to the Supreme Court of Errors of Connecticut on February 11, 1959. Thereafter on December 8th, 1959, the Supreme Court of Errors of Connecticut affirmed the judgment of the Superior Court.

Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Errors of Connecticut on February 19th, 1960.

This cause presents a justiciable issue. The conditions which establish the validity of the declaratory procedure were recently

set forth by this Court in *Evers* vs. *Dwyer*, 258 U. S. 202. It is submitted that this case meets the test. Appellant has standing to sue since his liberty to practice his profession and his property interest therein are involved.

There is a real and substantial controversy presented. Appellant's patients require and seek from him medical advice with respect to contraceptive devices and their use which they intend to employ to preserve their lives and their physical and emotional health. Appellant is unable to prescribe such contraceptive devices and instruments for the sole reason that appellee claims that both the giving of such advice and the use of such instruments and devices by appellant's patients are offenses under Sections 53-32 and 54-196 General Statutes of Connecticut, Revision of 1958 and that he will prosecute (as indeed he has heretofore prosecuted in *State* vs. *Nelson*, 126 Conn. 412) any violation of said statutes. Appellant claims and appellee denies that the said statutes, on their face and as applied to him, violate the Fourteenth Amendment to the Constitution of the United States. This question was raised and passed upon by the state court.

Appellant is entitled to have this important constitutional question settled insofar as his claimed rights are concerned and one of the purposes of the declaratory judgment procedure is to afford a method for such determination without subjecting appellant to the risk of fine or imprisonment or both and the possible loss of his license to practice his profession. Borchard, *Challenging Penal Statutes by Declaratory Actions*, 52 *Yale L. J.* 445.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Errors of Connecticut on appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on appeal in this case. *Nashville C. & St. L. R. Co.* vs. *Wallace*, 288 U. S. 249; *Evers* vs. *Dwyer*, *supra* at 202.

QUESTION PRESENTED

Whether Section 53-32 of the General Statutes of Connecticut, Revision of 1958, and Section 54-196 deprive appellant of his liberty and his property without due process of law in that he is thereby prevented from practicing his profession as an obstetrician and gynecologist according to scientific principles accepted and approved by the medical profession.

STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Section 53-32, General Statutes of Connecticut, Revision of 1958:

> "Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958:

> "Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

STATEMENT OF THE CASE

Appellant Buxton is a registered licensed physician and a specialist in obstetrics and gynecology. He was formerly a professor in these specialties at the Columbia-Presbyterian Medical Center in New York and at present is Professor and Chairman of the Department of Obstetrics and Gynecology at Yale University School of Medicine and the Grace-New Haven Community Hos-

pital. Appellant Buxton was and is the physician of appellants Jane Doe and Pauline Poe and it is his medical opinion that the best and safest treatment for these patients is the prescription by him and use by them of devices or instruments to prevent conception and future pregnancies. However, he is unable to administer such treatment and advice for the sole reason that the appellee, State's Attorney, claims that the giving of such advice and treatment by him and the use of such instruments by his patients are prohibited by Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, and that he will prosecute any violation of such statutes.

Appellant Buxton claims that the application of said statutes to him as a practicing physician deprives him of his liberty and his property without due process of law contrary to the 14th Amendment of the Constitution of the United States and in his complaint he asked the state court so to declare. Appellee, State's Attorney, demurred to this appellant's complaint thereby admitting all of of the aforesaid facts as alleged in appellant's complaint. After final judgment for appellee and affirmance by the Supreme Court of Errors of Connecticut appellant appeals to this Court and prays that the judgment of the Connecticut courts be reversed and that the statutes in question be declared unconstitutional.

The Questions Are Substantial

This case raises fundamental questions of personal liberty and property rights never passed upon by this Court. The statutes challenged purport to regulate the practice of medicine in an arbitrary manner which seriously restricts physicians in the practice of their profession and jeopardizes the lives and health of their patients.

POINT I

The Connecticut statutes are unconstitutional as to appellant Buxton in that they prohibit him from practicing his profession as a gynecologist and obstetrician, according to the scientific

principles upon which it is based and according to his conscience; they thereby deprive him of liberty and property without due process of law.

That the use of contraceptives is accepted by the public and endorsed by the organized medical profession in this country and by an overwhelming majority of individual physicians, see Point V of the Jurisdictional Statement in *Poe et al.* vs. *Ullman* and *Doe* vs. *Ullman*.

Appellant is Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and the Grace-New Haven Community Hospital. As such, it is his professional duty to teach medical students in the various contraceptive techniques. The law of Connecticut prohibits him from utilizing in his practice the very procedures which he teaches his students to employ. He is prevented from giving the medical advice to his patients at the hospital which the profession has demonstrated is in the best interests of their health. In his judgment the use of contraceptives made unlawful by this law is the best method for preserving the life of appellant Jane Doe and the physical and mental health of appellants Poes. The law unreasonably deprives him of his property and his liberty as a physician, sworn by his professional oath to uphold the best tradition of medical science.

This physician has a constitutionally guaranteed right to make a living. The right to work, in Mr. Justice Douglas's words, is "the most precious liberty that man possesses." (Dissenting in *Barsky* vs. *Board of Regents*, 347 U. S. 442, 472.) Not only has he the right to earn a living as a medical practitioner, but he may do so free from "unreasonable and unnecessary restrictions." (Mr. Justice Butler in *Burns Baking Co.* vs. *Bryan*, 264 U. S. 504, 513, and quoted approvingly by Mr. Justice Sutherland in *Liggett Co.* vs. *Baldridge*, 278 U. S. 105, 113.) The established doctrine is that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to

some purpose within the competency of the State to effect." *Meyer vs. Nebraska*, 262 U. S. 390, 399.

Are the conditions reasonable? The Connecticut law permits this doctor to abort his patient to save her life (General Statutes of Connecticut, Sec. 53-29, 1958 Revision) and he may advise her on methods of preventing conception and death. *But he can advise only the most unreliable ones.* See Point II, *infra*.

It is not denied that the courts presume that a legislature, when it adopts a statute, does, indeed, have "knowledge of conditions supporting its judgment that the legislation is in the public interest." (*Hardware Dealers Mutual Fire Ins. Co. vs. Glidden*, 284 U. S. 151.) Although the presumption concededly is a heavy one, it is not irrebuttable. *Meyer vs. Nebraska, supra* at 400.) Now what facts are presented to support the presumption? The record is barren of any legislative findings that these laws are in the public interest, that they will contribute to public morality or that they promote the public health or welfare. All this Court has to go on is the presumption that the Connecticut legislature knew what it was doing in 1879 when it passed these laws to prevent illicit intercourse and the possible, vague assumption that the voluntary limitation of the family by scientifically sound devices may not be in the public interest. Both judgments are demonstrated to be erroneous. Advice for the use of instruments and the sale thereof to prevent disease are legal although they will also prevent conception. See Point I of the Jurisdictional Statement in *Poe* vs. *Ullman* and *Poe et al.* vs. *Ullman*. The overwhelming weight of scientific judgment based upon the most careful and objective research is that the public interest requires effective and reliable contraceptive practices in the interest of the health and lives of women who will be adversely affected by pregnancy. See Point II, *infra*.

Appellant has a property right in his profession. When the state unreasonably deprives him of any valuable attribute of his property, it does so without due process of law. (*Buchanan* vs.

Warley, 245 U. S. 60 (1917)). In *England* vs. *Louisiana State Board of Medical Examiners*, 259 F.2d 626 (1958), the court reasoned:

> "Without doubt it is reasonable for the State to outlaw witch doctors, voodoo queens, bee stingers, and various other cults which no reasonably intelligent man would choose for the treatment of his ill, but it would certainly be arbitrary to exclude some if not all of the following classes which Louisiana does admit to practice: dentists, osteopaths, nurses, chiropodists, optometrists, pharmacists, and mid-wives. Just where is the dividing line? Under all of the cases, we think it is that the State cannot deny to any individual the right to exercise a *reasonable* choice in the method of treatment of his ills, *nor the correlative right of practitioners to engage in the practice of a useful profession.*" (Emphasis added.)

It is the essence of the dedicated professions that the physician, like the lawyer, owes his firm allegiance to persons who have placed their physical, mental or legal welfare in his hands. In both cases it is submitted that it is an unreasonable restriction to prohibit scientifically sound procedure on the basis of judgments, unsupported by facts, that some fanciful balance of public interest will be thereby advanced. The law of Connecticut prohibits this appellant from protecting the physical and mental health of appellants Poes and the life of appellant Jane Doe by the best scientific methods, but permits him by those identical methods to protect from venereal disease persons engaged in illicit intercourse. It is submitted that it is impossible to identify this law with the general welfare and equally impossible to find that it is consistent with any acceptable principle of morality.

We have indicated elsewhere that in certain cases proper medical practice today requires knowledge of and prescription by physicians of contraceptive devices. "The proper prescription of birth control measures is an important and indeed essential aspect of

preventive medicine."[1] Physicians must exercise that reasonable judgment and skill possessed by the average member of their class and if they have additional skill and competence they must utilize that which they have.[2] Thus, the medical practitioner "must keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions." *Stone* vs. *Goodman*, 241 A. D. 290, 294, 271 N. Y. S. 500.

Appellant Buxton departs "from approved methods" only under compulsion of Connecticut law. No one would contend that in Connecticut he would be guilty of malpractice in an action for the death from pregnancy of appellant Doe. But if he practiced his profession in any state but Connecticut or Massachusetts, it is submitted that his failure to prescribe an effective contraceptive device would subject him to liability for failing to exercise that reasonable judgment and skill prevailing among obstetricians and gynecologists in the locality.[3] This, it is urged, goes far toward establishing the unreasonable character of the Connecticut statutes which prevent this physician from exercising the skill and judgment which he has and which is unquestionably established in his profession as the norm for all practitioners in his specialty. Failure to adopt appropriate and customary preventive measures as well as careless diagnosis or improper treatment may constitute malpractice. *Walden* vs. *Jones*, 289 Ky. 395, 158 S. W. (2) 609; *Craig* vs. *Chambers*, 17 Ohio St. 253.

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[1] Statement by professors of Obstetrics and Gynecology, quoted in the *New York Times*, Aug. 1, 1958.

[2] See Harper and James, *Law of Torts*, II, p. 919; *Restatement of Torts*, Sec. 299 (f).

[3] *Restatement of Torts*, Sec. 299 (d).

POINT II

The Connecticut statutes are arbitrary and unreasonable in that they forbid physicians from following what the overwhelming preponderance of medical opinion regards as necessary to protect the lives and health of patients.

Guttmacher, in a poll of 3,381 physicians, found the following results as to patient acceptability, degree of trustworthiness and prescription by them.[4]

Reliability and Acceptability of Methods Prescribed

Method	Percentage of Doctors Indicating Technique As First Choice For: Prescription	Reliability	Acceptability
No. of doctors indicating one or more techniques	2,516	2,726	2,739
		Per Cent	
Diaphragm and jelly or cream	69.6	62.1	67.1
Condom	9.5	14.1	9.4
Rhythm	4.7	1.4	4.7
Condom and jelly or cream	3.7	7.7	4.3
Jelly or cream alone	3.5	1.5	6.5
Cervical cap	2.3	1.8	2.2
Abstinence	1.5	8.0	1.2
Douches	2.4	0.8	2.0
Intracervical stem pessary	1.3	2.2	1.4
Foam Powder and Sponge	0.4	0.1	0.2
Suppositories	0.6	0.1	0.8
Withdrawal	0.7	0.3	0.2

It will be noted that the only methods for controlling conception in this table which are not prohibited by the Connecticut statutes are rhythm, abstinence and withdrawal. Of these only 1.4 per

[4] *Human Fertility*, Vol. 12, No. 1, March, 1947.

cent of the replies listed rhythm as "reliable," 0.3 per cent for withdrawal and while 8 per cent rated abstinence as reliable, this method was recommended by only 1.5 per cent and regarded as acceptable by patients by 1.2 per cent.

This situation, medically, is the reverse of that in *Jacobson* vs. *Massachusetts*, 197 U. S. 11, where this Court, referring to offers of proof, rejected by the Massachusetts courts, said: "Those offers, in the main, seem to have no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body. What everyone knows, the court must know, and therefore the state court judicially knew, as this Court knows, that an opposite theory accords with the common belief and is maintained by high medical authority." (197 U. S. 11, 30.)

In *Jacobson* this Court said further: "We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them." So, too, in *Lambert* vs. *Yellowley*, 272 U. S. 581, the Court upheld an Act of Congress limiting the amount of liquor which could be prescribed for medicinal purposes because there was substantial medical authority that spirituous liquor had no medicinal value. "... the limitation as to quantity," wrote Mr. Justice Brandeis, "must be taken as embodying an implicit Congressional finding that such liquor had no such medicinal value as gives rise to a need for larger or more frequent prescriptions. Such a finding, in the presence of well-known diverging opinions of physicians, cannot be regarded as arbitrary or without a reasonable basis." (272 U. S. 581, 595.) Mr. Justice Sutherland joined by Justices McReynolds, Butler and Stone, dissented because they found no medical opinion to support the limitation on prescriptions.

In discussing *Eyard's Breweries* vs. *Day*, 265 U. S. 545, Mr. Justice Brandeis said: "The Court further held that Congress must be regarded as having concluded—as it well might do in the absence of any concensus of opinion among physicians and in the presence of the absolute prohibition in many of the States—that malt liquor has no substantial medicinal qualities making its prescription necessary; and that this made it impossible to say the provision was an unreasonable and arbitrary exercise of power." 272 U. S. 581, 595.

The situation here is different. There is no appreciable body of "diverging" medical opinion. Insofar as there is any at all, it is negligibly "fractional." These are cases involving life and death. The experience of mankind throughout the ages, supported by the overwhelming opinion of the medical profession, is that young married couples in love with each other cannot, in the circumstances in which Dr. Buxton's patients find themselves, save their marriage and their lives by the alternatives available under the law of Connecticut. It is urged that this law is "arbitrary [and] without a reasonable basis."

Under the rationale of *Jacobson*, this law is unconstitutional. Mr. Justice Harlan there said:

> "Extreme cases can be readily suggested . . . It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of health or of his body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied in such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." (197 U. S. 11, 39.)

Under the law of Connecticut as interpreted by the Supreme Court of Errors, these "extreme" cases are included and there

is no way by which the medical profession can "protect the health and life of the individual concerned," unless this Court regards itself as "competent to interfere."

CONCLUSION

The issue in this case is of the highest importance to the appellant and of far reaching significance to the medical profession and, through it, to the public of Connecticut and the nation. It is submitted that the Fourteenth Amendment to the Constitution forbids the legislature of any state to enact laws which fly in the face of science and which unreasonably restrict physicians from giving to their patients the best medical care of which they are capable.

Respectfully submitted,

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APPENDIX

Supreme Court of Errors

OCTOBER TERM, 1959

C. LEE BUXTON,
Appellant

ABRAHAM S. ULLMAN, *State's Attorney*,
Appellee

Actions for declaratory judgments determining the constitutionality of legislation forbidding the use and prescription of contraceptive devices, brought to the Superior Court in New Haven County, where demurrers to the complaints were sustained, *Healey, J.*, and, the plaintiff failing to plead further, judgments were rendered in favor of the defendant, from which the plaintiffs appealed. *No error.*

Catherine G. Roraback, for the appellants (plaintiffs).

Raymond J. Cannon, assistant attorney general, with whom, on the brief, was *Albert L. Coles*, attorney general, for the appellee (defendant) in each case.

BALDWIN, C. J. The complaints in these four actions seek declaratory judgments as to the constitutionality of § 53-32 of the General Statutes, prohibiting the use of any drug, medicinal article or instrument for the purpose of preventing conception, and

§ 54-196, prohibiting the counseling or abetting of such use.[1] The plaintiff C. Lee Buxton is a licensed physician. The plaintiff Jane Doe is a married woman living with her husband. The plaintiffs Paul and Pauline Poe, as well as the plaintiffs Harold and Hanna Hoe, are husband and wife. Except for Dr. Buxton, all the plaintiffs are using, for the purpose of this litigation, fictitious names. They are patients of Dr. Buxton. The plaintiffs claim that the two statutes deprive them of rights guaranteed by the fourteenth amendment to the federal constitution. The defendant demurred to all the complaints; among his grounds were that the plaintiffs were seeking declaratory judgments on legal issues already conclusively determined by this court and that the passage of time and a change in the personnel of the court would not justify a reversal of those determinations. The trial court sustained the demurrers on these grounds, and the plaintiffs have appealed.

A demurrer to a complaint for a declaratory judgment is proper when the facts alleged do not bring the case within the scope of the statute and rules relating to declaratory judgments. General Statute §52-29; Practice Book § 277; *Hill v. Wright*, 128 Conn. 12, 15, 20 A.2d 388; Maltbie, Conn. App. Proc. § 227; see *Glens Falls Ins. Co. v. Somers*, 146 Conn. 708, 713, __ A.2d __. If the rights and jural relations of parties in the situation of these plaintiffs have been conclusively determined by previous decision of this court, the demurrers were properly sustained upon the grounds stated.

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[1]"Sec. 53-32. *Use of drugs or instruments to prevent conception.* Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

"Sec. 54-196. *Accessories.* Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Twice in the recent past this court has passed upon questions of interpretation and constitutionality of what are presently §§ 53-32 and 54-196. *State* v. *Nelson*, 126 Conn. 412, 11 A.2d 856, decided March 6, 1940, held that there was no ambiguity in the wording of the statutes which made the legislative intent uncertain so as to permit a construction which allowed an exception in favor of a duly licensed physician who prescribes the use of contraceptive measures to a patient who is a married woman when, in his professional opinion, her general health and well-being necessitate it. We said (p. 417): "Any intention on the part of the Legislature to allow [the exception claimed] is negatived not only by the absolute language used originally and preserved ever since but also, signally, by [the legislature's] repeated and recent refusals to inject an exception." We held, also (p. 422), that the statute was a valid exercise of the police power. We pointed out (p. 418) that the particular facts alleged in the information confined the issues to situations where, in the opinion of the physician, " 'the general health' of a married woman requires the use of contraceptives." We said that there was, therefore, "no occasion to determine whether an implied exception might be recognized when 'pregnancy would jeopardize life' . . . similar to that usually expressly made in statutes concerning abortion." See General Statutes §53-29.

In *Tileston* v. *Ullman*, 129 Conn. 84, 26 A.2d 582, decided May 22, 1942, the plaintiff, a licensed physician, brought an action for a declaratory judgment to determine whether the statutes forbade him from prescribing the use of contraceptives for a married woman in cases where a pregnancy would endanger her life or health and, if the statutes did, whether they were constitutional. This presented the issue which we specifically said was not before us in the *Nelson* case. We held in the *Tileston* case that, in the light of the legislative history of the statutes and the repeated and recent refusals of the legislature to inject any exception, the statutes could not be construed to allow the exception claimed, and that they were constitutional.

It is claimed that the facts in the cases at bar present an entirely different situation with respect to the rights of the plaintiffs from that presented in the *Nelson* and *Tileston* cases. In Buxton v. Ullman, the complaint alleges, in substance, and the demurrer admits, thatt he plaintiff, a licensed physician, has a patient, Jane Doe, a married woman twenty-five years of age, living with her husband. She had been admitted to the obstetrical service of the hospital where the plaintiff, an eminently qualified obstetrician and gynecologist, was in charge. She was three and one-half months pregnant and developed a condition which brought her to the very brink of death. Her physical condition is now such that conception and another pregnancy would be exceedingly dangerous to her life. She needs and requires advice as to what preventive measures can be taken to avert a recurrence of the experience she suffered. She claims a right to live a normal married life with her husband. She has asked the plaintiff for medical advice, and he has knowledge of drugs, medicinal articles and instruments which could be used by her to prevent conception and avoid the serious consequences of another pregnancy. In a companion case, Doe v. Ullman, the plaintiff is the patient described in the Buxton case, and she alleges, in substance, the same facts as are alleged in the Buxton complaint. In another companion case the complaint alleges, in substance, that the plaintiffs, Paul and Pauline Poe, are a married couple who have consulted Dr. Buxton. Mrs. Poe, who is twenty-six years old and living with her husband, has borne three abnormal children, no one of whom lived more than ten weeks. The basic cause of these abnormalities is thought by Dr. Buxton and other qualified medical specialists to be genetic, but the prognosis is very uncertain and renders the prospect of another pregnancy extremely disturbing to both Mr. and Mrs. Poe. In still another case the plaintiffs, Harold and Hanna Hoe, aged twenty-nine and twenty-six years, respectively, husband and wife, have no living children. Mrs. Hoe has been delivered of four children. Owing to the blood groupings of these plaintiffs, Mrs. Hoe's blood being Rh negative and Mr.

Hoe's Rh positive, the prospects that they can procreate a normal child is highly unlikely.

The plaintiff Buxton has knowledge of drugs, medicinal articles and instrumentalities which could be safely used to prevent conception and avert the dire consequences which have followed conception and pregnancy in the women plaintiffs, who desire to live normal married lives with their husbands. If the plaintiff Buxton, on one hand, applies this knowledge by advising these married people as to available contraceptive measures, and if, on the other hand, these married people accept and follow his advice, the statutes would be violated by all the plaintiffs. It is conceded by the demurrers that the use of contraceptives is, according to medical science, the best and safest preventive measure for the plaintiffs to follow in order to avoid pregnancy.

The plaintiffs claim that these facts raise issues not raised in the *Nelson* and *Tileston* cases. The plaintiff Buxton asserts that he has a constitutional right, distinct from that of his patients, to practice his profession free from unreasonable restraint and to advise and prescribe the use of drugs, medicinal articles and instrumentalities which he believes it to be his professional obligation to prescribe. The facts in the Buxton case differ from those in the *Tileston* case in that here the plaintiff, a physician, is asserting an alleged constitutional right of his own rather than an alleged constitutional right of a patient. Essentially, there is no real difference in the nature of the right. The effect of regulation of a business or profession is to curtail the activities of both the dispenser and the user of goods or services. Both are deprived of some advantage which they might otherwise have. The Doe, Poe and Hoe cases differ from the *Nelson* and *Tileston* cases in that the plaintiffs here are asserting their rights, as patients, to the benefit of a physician's prescription for the use of contraceptives which would relieve them of a dangerous threat to their health and happiness. Their right, too, is essentially the same as that of the physician. In other words, the difference between the *Tileston* and *Nelson* cases and those at bar lies only in the fact

t[illegible]here each plaintiff is asserting his own constitutional right, while in the *Nelson* and *Tileston* cases the doctors were attempting to assert the right of their patients to receive treatment.

It cannot be questioned that the "state may 'regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote . . . the common good.'" *State* v. *Vachon*, 140 Conn. 478, 481, 101 A.2d 509, quoting from *House* v. *Mayes*, 219 U. S. 270, 282, 31 S. Ct. 234, 55 L. Ed. 213. The exercise of this power is always "subject, in the courts, to the test whether it serves the public health, safety and morals at all and whether it does so in a reasonable manner." *Amsel* v. *Brooks*, 141 Conn. 288, 294, 106 A.2d 152. In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet the threat. Courts interfere with legislation enacted under the police power only when it clearly appears that the legislative measures taken do not serve the public health, safety, morals or welfare or that they deny or interfere with private rights unreasonably. *Clark* v. *Town Council*, 145 Conn. 476, 482, 144 A.2d 327; *State* v. *Gordon*, 143 Conn. 698, 703, 125 A.2d 477; *Cyphers* v. *Allyn*, 142 Conn. 699, 705, 118 A.2d 318. It was out of respect for these fundamental principles that this court in the *Nelson* and *Tileston* cases refused to so interpret the statutes as to allow an exception to cover situations of the kind presented in the cases at bar and upheld the constitutionality of the statutes.

If the plaintiffs are correct in their claims, we would be required to follow one of two courses: overrule the *Nelson* and *Tileston* decisions by construing the statutes to include the exception proposed in those cases and thus permit physicians to prescribe, and patients to use, contraceptive measures under circumstances similar to those present in the cases at bar, and by that means sustain the constitutionality of the statutes; or hold that the statute, with-

out the claimed exception are unconstitutional. Since the *Tileston* decision in 1942, the General Assembly has consistently refused to amend the statutes so as to allow physicians to prescribe the use of contraceptive measures.[2] Furthermore, two complete revisions of the general statutes have been approved by the General Assembly and the statutes in question have been left unchanged. Rev. 1949, §§8568, 8875; Rev. 1958, §§53-32, 54-196. The legis-

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[2] 1943 Sess., H.B. 313. *An act to establish standards for contraceptive devices and their distribution* (blank bill). Referred to committee, H. Jour. p. 194, S. Jour. p. 209; committee recommended rejection and passage of substitute, H. Jour. p. 1296; House passed substitute, H. Jour. p. 1339; Senate rejected, S. Jour. p. 1313; House adhered to former action, H. Jour. p. 1480.

1945 Sess., H.B. 317. *An act concerning the rights of physicians to prescribe for their patients* (providing for permitting of physicians to prescribe methods or means for the temporary prevention of pregnancy when necessary to save life or prevent serious injury to health). Referred to committee, H. Jour. p. 263, S. Jour. p. 257; hearing held on May 1; but bill not reported thereafter.

1947 Sess. H.B. 953. *An act concerning the rights of physicians to prescribe for their patients* (providing that physicians may prescribe for the temporary prevention of pregnancy when in the opinion of the physician, pregnancy would endanger the life or injure the health of a married woman). After receiving a favorable committee report, House passed, H. Jour. p. 733; Senate rejected, S. Jour. p. 752; House adhered to former action, H. Jour. p. 808.

1949 Sess., H.B. 1110. *An act concerning the right of licensed physicians to prescribe for married women* (providing for physicians to prescribe for the health of married women). Referred to committee, H. Jour. p. 307, S. Jour. p. 368; hearing held April 12 and May 3 (executive session) but no indication of a further report.

1951 Sess. H.B. 1483. *An act concerning the right of licensed physicians to prescribe for married women* (providing for physicians to prescribe methods or means for temporary prevention of pregnancy in a married woman when pregnancy would endanger the life or injure the health of such married woman). Referred to committee, H. Jour. p. 273, S. Jour. p. 266; hearing held April 11; bill withdrawn.

lature is presumed to be aware of the interpretation placed upon its legislation by the courts and the effect which its own nonaction thereafter may have. *Herald Publishing Co. v. Bill*, 142 Conn. 53, 63, 111 A.2d 4; *Hurlbutt v. Hathaway*, 139 Conn. 258, 263, 93 A.2d 161. Courts cannot, by the process of construction, abrogate a clear expression of legislative intent, especially when, as here, unambiguous language is fortified by the refusal of the legislature, in the light of judicial interpretation, to change it. *Watrous v. Connelly*, 141 Conn. 257, 263, 105 A.2d 654; *Herald Publishing Co. v. Bill*, supra; *Pennsylvania R. Co. v. International Coal*

S.B. 696. *An act concerning the right of licensed physicians to prescribe for married women* (providing for birth control). Referred to committee. S. Jour. p. 192, H. Jour. p. 304; hearing held April 11, but bill not reported thereafter.

H.B. 1485. (Same title and content as H.B. 483). After reference to committee by both House and Senate, House passed, H. Jour. p. 717; bill not reported from Senate Committee.

1953 Sess. H.B. 1452. *An act amending an act concerning the right of licensed physicians to prescribe for married women.* After referral to committee by both the House and Senate, and after a petition was filed to get the bill out of committee, a favorable report was made. House passed, H. Jour. p. 1024. Senate recommitted, S. Jour. p. 942; no report thereafter.

1955 Sess. H.B. 1177. *An act concerning the use of drugs or instruments to prevent conception* (providing for the removal of the prohibition on physicians in the prescribing of the use of contraceptives). House passed, H. Jour. p. 949. Senate rejected, S. Jour. p. 1054.

H.B. 1182. *An act concerning the right of licensed physicians to prescribe for married women* (providing for the permitting of licensed physicians to prescribe and others to use and sell contraceptive devices). House passed, H. Jour. p. 954; Senate rejected, S. Jour. p. 1054.

1957 Sess. H.B. 572. *An act concerning the dissemination of information concerning and prescription of contraceptives to married women.* House passed, H. Jour. p. 944; Senate rejected, S. Jour. p. 867.

1959 Sess. H.B. 3427. *An act concerning prevention of conception pursuant to spiritual or medical advice.* Referred to committee, H. Jour. p. 276, S. Jour. p. 292; hearing held April 24, but bill not reported thereafter.

Mining Co., 230 U. S. 184, 198, 33 S. Ct. 893, 57 L. Ed. 1446. In short, courts cannot write legislation by judicial decree; this is particularly so when the legislature has refused to rewrite the existing legislation. The *Nelson* and *Tileston* decisions cannot be overruled by any attempt to reconstruct the statutes.

Since the injection of an exception by construction is legally impossible, can we now hold that the statutes are unconstitutional? By reason of the facts in the instant cases, the claims of infringement of constitutional rights are presented more dramatically than they have ever been before. Basically, the claims are, nevertheless, essentially the same as those which this court considered in the *Nelson* and *Tileston* cases. It may well be that the use of contraceptives is indicated as the best and safest preventive measure which medical science can offer these plaintiffs. That fact does not make it absolutely necessary for the legislature to accept such a solution in all cases, where there is, as pointed out in the *Tileston* case (p. 92), another alternative, abstinence from sexual intercourse. We cannot say that the legislature, in weighing the considerations for and against an exception legalizing contraceptive measures in cases such as the ones before us, could not reasonably conclude that, despite the occasional hardship which might result, the greater good would be served by leaving the statutes as they are.

The plaintiff's argument raises an issue of public policy. Each of the separate magistracies of our government owes to the others a duty not to trespass upon the lawful domain of the others. The judiciary has a duty to test legislative action by constitutional principles, but it cannot, in that process, usurp the power of the legislature. *State* v. *Gilbert*, 98 Conn. 702, 714, 120 A. 567; *Watnick* v. *Adorno*, 133 Conn. 511, 513, 52 A.2d 702; *General Motors Corporation* v. *Mulquin*, 134 Conn. 118, 132, 55 A.2d 732; *State ex rel. Higgins* v. *Civil Service Commission*, 139 Conn. 102, 111, 90 A.2d 862; *Herald Publishing Co.* v. *Bill*, supra. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly,

that will should be recognized and obeyed.' " *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 351, 57 S. Ct. 452, 81 L. Ed. 685, quoting from *Johnson* v. *United States*, 163 Fed. 30, 32; *United States* v. *Cooper Corporation*, 312 U. S. 600, 606, 61 S. Ct. 742, 85 L. Ed. 1071; *Helvering* v. *Wood*, 309 U. S. 344, 347, 60 S. Ct. 551, 84 L. Ed. 796; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394, 60 S. Ct. 907, 84 L. Ed. 1263; *Butterworth* v. *Boyd*, 12 Cal. 2d 140, 146, 82 P.2d 434; *Collision* v. *State ex rel. Green*, 39 Del. 460, 486, 2 A.2d 97; *McDonald* v. *Eagle Coal Co.*, 99 Mont. 309, 314, 43 P.2d 635; *Brahmey* v. *Rollins*, 87 N. H. 290, 298, 179 A. 186. We conclude that §§ 53-32 and 54-196 are a constitutional exercise of legislative power.

Although this disposes of the case, we note the claim of the defendant that in the Doe, Roe and Poe cases the plaintiffs are obviously fictitious persons and it must necessarily follow that the questions sought to be adjudicated are academic and do not apply to any real person or persons. General Statutes, §52-89, provides, in part, that writs in civil actions shall describe the parties, presumably by their real names, so that they may be identified. Practice Book § 199 states, among other things, that "[i]n the captions of pleas, answers, etc., the parties may be described as John Doe v. Richard Roe et al., but this will not be sufficient in a judgment file which must give all the data necessary for use in drawing the execution." Because of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would wish to be anonymous. To obviate any possibility that the parties and the issues raised are fictitious and that the jurisdiction of the court is being invoked to decide moot questions, a plaintiff who desires to use a name other than his own should, before the case is presented in court, acquaint the court of his desires, establish the fact that the parties and issues are real although the names are fictitious, and secure the court's consent, as was done in these

cases. The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.

There is no error.

In this opinion the other judges concurred.

At a Supreme Court of Errors Held at Hartford on the First Tuesday of October, A. D. 1959.

Present, Hon. Raymond E. Baldwin, Chief Justice.

Hon. John Hamilton King
Hon. James E. Murphy
Hon. Samuel Mellitz
Hon. William J. Shea
Associate Judges.

C. Lee Buxton, of the Town of Woodbridge, County of New Haven, State of Connecticut

vs.

Abraham S. Ullman, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven

On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT.

This appeal by the plaintiff claiming error in the process, record and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on file in this court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D.

1959, and came to this court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the

appellee recover of the appellant his costs taxed at $87.20.

Date of judgment, December 8, 1959.

By the Court,
EDWARD HORWITZ, Clerk.